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No. 01-

IN THE

Supreme Court of the United States

TOBIN FOR GOVERNOR, JEAN L. BAKER, RAYMOND A. DUBIEL, JAMES J. MORRIS, and ROBERT S. REDFERN,

Petitioners,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS, and its members, individually and in their official capacities, HANNELORE HUISMAN, KENNETH CHARLES J. DURHAM, WILLIAM McGUFFAGE, DAVID E. MURRAY, PHILIP O'CONNOR, WANDA REDNOUR, and ELAINE ROUPAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN R. MERICAN
Counsel of Record
STEVEN R. MERICAN, P.C.
1315 W. 22nd Street – Suite 225
Oak Brook, IL 60523
(630) 579-6460

Attorney for Petitioners

171228

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

58pp

QUESTION PRESENTED

Under certain circumstances, state-agency officials are entitled to judicial immunity to protect them from the harassment of lawsuits for compensatory damages by disgruntled parties. A criterion for application of absolute judicial immunity for state-agency officials is that there must be some modicum of fairness and integrity to the adjudicatory system in question. One of the factors used to assess that fairness is whether the agency officials and the system are sufficiently insulated from political pressure.

The members of the Illinois State Board of Elections are, by statutory command, political appointees who serve in their positions because of their affiliation with one of the two major political parties. The members decide ballot-access disputes that often are instituted by one of the major parties to prevent minor-party candidates from appearing on the election ballot. The board members thus are in a unique position, by their decisions, to limit access to the election ballot, and political competition and discourse.

The question presented is whether under these circumstances the members of the Illinois State Board of Elections are entitled to absolute judicial immunity for their alleged unconstitutional actions in preventing minor-party candidates from appearing on the election ballot.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Tobin for Governor is a non-corporate political committee created in April 1998 for the purpose of electing Jim Tobin Governor of Illinois.

All of the other Petitioners are individuals.

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated December 7, 1999 ..... 25a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Gettleman, D.J.) granting respondents' motion to dismiss is not officially published, but appears in the Appendix to this petition. (Appendix ("Pet. App.") 25a-33a). The district court's Memorandum Opinion and Order may also be found at 1999 U.S. Dist. LEXIS 22108. A later opinion granting and denying cross motions for summary judgment is published at 105 F. Supp.2d 882. The court of appeals' opinion (per Ripple, J., joined by Flaum, C.J., and Wood, J.,) affirming (Pet. App. 1a-24a) is published at 268 F.3d 517.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on October 5, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

10 ILCS 5/10-2 (as pertinent):

> . . . Any group hereafter desiring to form a new political party throughout the State . . . shall file with the State Board of Elections a petition, as hereinafter provided . . . [I]f such new political party shall be formed for the entire State, [the petition] shall be signed by 1% of the number of voters who voted at the next preceding Statewide general election or 25,000 qualified voters, whichever is less.

10 ILCS 5/10-10 (as pertinent):

> . . . The electoral board shall take up the question as to whether or not the certificate of nomination or nomination papers or petitions are in proper form, and whether or not they were filed within the time and under the conditions required by law . . . The electoral board must state its findings in writing and must state in writing which objections, if any, it has sustained.

10 ILCS 5/1A-3 (as pertinent):

> . . . (1) the Governor shall appoint 2 members of the same political party with which he is affiliated, one from each area of required residence.
>
> (2) The Governor shall appoint 2 members of the political party whose candidate for Governor in the most recent general election received the second highest number of votes, one from each area of required residence, from a list of nominees submitted by the first state executive officer in the order indicated herein affiliated with such political party: Attorney General, Secretary of State, Comptroller, and Treasurer. If none of the State executive officers listed herein is affiliated with such political party, the nominating State officer shall be the first State executive officer in the order indicated herein affiliated with an established political party other than that of the Governor.

STATEMENT OF THE CASE

Petitioner Tobin for Governor is a state political committee formed pursuant to the laws of Illinois. The committee directed Jim Tobin's campaign for Governor of Illinois in 1998, and made monetary expenditures to that end. Jim Tobin was slated by the Libertarian Party of Illinois ("LPI") as its candidate for governor. The other Petitioners — Jean L. Baker, Raymond A. Dubiel, James J. Morris, and Robert S. Redfern — are Illinois citizens and registered voters who signed the LPI's petition to place Tobin and other candidates for statewide offices and United States Senator on the November 1998 general election ballot. The Respondents were members of the Illinois State Board of Elections ("Members") when the board issued the Decision that is the subject of this case. Each Respondent signed the subject Decision.

The LPI sought ballot access to form a new statewide political party by filing petition papers with its slate of candidates, as required by 10 ILCS 5/10-2. Although 25,000 valid signatures are required for a minor-party candidate to appear on the election ballot, the petition contained in excess of 60,600 signatures. An objection to the petition was filed with the Illinois State Board of Elections on or about August 10, 1998. Proceedings conducted by a Board appointed Hearing Officer ("HO") began on August 17, 1998, and proceeded occasionally throughout August and September, and into October 1998.

On October 12, 1998, the HO issued a lengthy recommended Decision on the objection. The decision sustained and denied parts of the objection, and concluded that 26,610 valid signatures had been filed. He therefore

recommended that the slate of candidates be certified for the election ballot. (Pet. App. 3a.) Also on that date, the Board's General Counsel wrote that he could "find no reason to oppose any recommendation in" the HO's Decision. The General Counsel stated that the HO "has correctly applied the applicable law" *Ibid.*

The very next day, after argument of counsel, the Members struck an additional 4,285 signatures, bringing the total of valid signatures below 25,000. Other than to identify by petition circulator which signatures they struck, the Members did not state additional findings nor which objections they sustained. The Illinois Election Code requires the Board to make written findings and to state in writing which objection it sustained. 10 ILCS 5/10-10.

The candidates filed a motion for preliminary injunction in the Circuit Court of Cook County, Illinois to have their ballot certification reinstated, or, alternatively, to halt the election until the matter could be resolved. That motion was denied.

At the same time, they filed a petition for judicial review of the Board's Decision. The petition raised a number of issues that disputed whether the Member's Decision complied and was consistent with Illinois law. However, on October 30, 1998, the Friday before the election, the circuit court dismissed the petition for judicial review for lack of jurisdiction. The circuit court ruled that the candidates did not make the LPI a party to the petition for judicial review and did not timely serve the Objectors. The court ruled that each was sufficient to deprive it of subject matter jurisdiction. The court dismissed the case, and the dismissal was affirmed on appeal. A petition for leave to appeal to the Illinois Supreme Court was denied. (Pet. App. 4a.)

This lawsuit was filed in the federal district court in April 1999. The complaint asserts causes of action for violations of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. § 1983. All of the Petitioners sued for monetary damages and a declaratory judgment arising from the decision of the Illinois Board of Elections and its members refusing to certify the LPI's slate of candidates.

Tobin for Governor seeks compensation for the significant sum of money it spent during the campaign only to be thrown off the ballot improperly. The individual petition signers seek monetary compensation for the injury to their constitutional rights — i.e., being deprived of their fundamental rights to vote for properly qualified candidates, and to associate to advance their political beliefs. The candidates who brought the state court action for judicial review of the Board's ruling are not parties in this case.

All of the Petitioners sought a declaratory judgment that the Members' acts were unconstitutional and therefore were void. This aspect of the complaint was dismissed. The dismissal of the declaratory judgment counts was affirmed on appeal, and is not a subject of this petition.

Petitioners also sought a declaration that 10 ILCS 5/10-4 was unconstitutional insofar as it required petition circulators to be registered voters. The district court ruled that it was unconstitutional. The Board of Elections appealed, but withdrew the appeal after briefing.

All of the Defendant-Respondents moved to dismiss the case. Their motion raised the Rooker-Feldman doctrine, mootness, standing, abstention, and quasi-judicial absolute

immunity. The district court denied the motion except as to absolute immunity. The district court ruled that the Members were entitled to quasi-judicial absolute immunity and thus dismissed the claims for compensatory damages. The court found that the ". . . the Board was acting in an adjudicative capacity when it determined the validity of the petition signatures . . . Accordingly, this court concludes that defendants are entitled to quasi judicial immunity. . . ." (Pet. App. 31a.)

The proceedings continued, and cross motions for summary judgment were filed. The district court granted and denied in part the Petitioners' motion, and denied the Respondents' motion. The issues that were decided on summary judgment are not a part of this petition.

The Petitioners appealed to the Seventh Circuit Court of Appeals. One of the issues in that appeal was whether it was error to dismiss the claims for compensatory damages based on absolute judicial immunity.

The court of appeals affirmed the district court ruling. The court stated that the indicia for absolute immunity existed in the hearing before the Illinois State Board of Elections, and that the Members were acting as judges in deciding whether the nomination petition contained sufficient valid signatures. The court concluded that there was a common-law or historical basis for the immunity; that it was irrelevant that this was not an instance of vexatious litigation; and that there was an effective check on potential abuse of authority by the Members.

Most importantly as relevant here, the court rejected Petitioners' argument that absolute immunity should not attach to the Members because they were not sufficiently insulated from political influence. The court was "unwilling" to accept Petitioners' position that bias and political motive are built into the system in the State Board of Elections because the Members, the decision-makers, are appointed to the Board by virtue of their party affiliation. The court of appeals found it unpersuasive that the Members are in a position to reward their political benefactors and allies at the cost of ruling against minority-party and independent candidates, and that doing so has an injurious effect on the course and substance of political speech and discourse.

REASONS FOR GRANTING THE WRIT

The ruling by the Seventh Circuit Court of Appeals stands as the only one in which members of a board of elections have been granted absolute judicial immunity. This case stands in contrast to all others in which immunity for election board members is discussed. In all of the other cases, the question was whether the board members were entitled to qualified immunity; sometimes it was allowed, sometimes not. The subject of absolute immunity did not even arise. This Court should grant the writ to harmonize the inconsistent rulings.

The Members of the Illinois State Board of Elections are, by statutory mandate, political appointees of the Governor of Illinois. They are in a unique position to influence access to the election ballot of competing minority-party and independent candidates, and the course of political debate. They have the power to steer political power to their political cronies, and to stifle their political competitors.

Because in many circumstances the safeguards against the Members abusing this power are insufficient, and because the Members are subject to considerable political influence, they are not deserving of absolute immunity. This Court should grant the writ to assure that the courthouse remains open to citizens who are deprived of their constitutional rights to vote for properly qualified candidates and to political association.

I. The decision by the Seventh Circuit Court of Appeals is the only one of its kind and stands in contrast to an established and accepted rule in other circuits and district courts. This decision also ignores a basic principle set by this Court for immunity analysis — that qualified immunity for agency officials is sufficient.

This decision is the only one to rule that election board members have absolute judicial immunity. The court of appeals did not cite any other cases that hold likewise; nor did the district court. The Respondent Board Members did not cite any such cases in their support in either the district or appellate courts. Our research has found none.

In contrast, a number of cases begin with the presumption that election board members, under proper circumstances, are entitled only to a qualified immunity. Most recently, the Ninth Circuit Court of Appeals held that a territorial board of elections could not even claim qualified immunity when the board had implemented and applied new and discriminatory procedures to determine whether certain individuals, whose eligibility had been challenged, were entitled to vote. *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951-56 (2001). Also in the Ninth Circuit, *see Oakley v.*

Pasadena, 535 F.2d 503 (1976), where city board members had qualified immunity in a lawsuit brought by a candidate who was denied a place on the election ballot.

Other courts have reviewed the question of whether election board members are entitled to immunity. All of those cases turn on whether the board members have qualified immunity. None of them even consider absolute immunity. For example:

- In *De La Cruz v. Dufresne*, 533 F. Supp. 145 (D.Nev. 1982), the court denied motions for summary judgment by county election board members, ruling that whether they were entitled to qualified immunity was a mixed question of law and fact.

- In *Kilgore v. McClelland*, 637 F. Supp. 1241 (W.D. Va. 1985), county elections board members also were denied qualified immunity for their decisions not to reappoint plaintiffs as general registrars.

- In *Pestrak v. Ohio Elections Comm'n.*, 670 F. Supp. 1368 (S.D. Ohio 1987), *reversed in part on other grounds*, 926 F.2d 573 (6th Cir. 1991), plaintiff candidate sued members of the Ohio Elections Commission, when, during a campaign, they ruled that the candidate violated Ohio law by making false statements in his campaign advertisements. The defendant elections commission members were allowed qualified immunity to the extent they were sued for monetary damages in their individual capacities.

- In *Hirschfeld v. Spanakos*, 909 F. Supp. 174 (S.D.N.Y. 1995), *reversed on other grounds*, 104 F.3d 16 (2d Cir. 1997), after lengthy analysis, the court ruled that individual members of the Board of Elections were entitled to qualified immunity from a § 1983 lawsuit for monetary damages that grew out of a candidate ballot-access dispute.

- In *McLaughlin v. City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995), members of the City of Canton, Mississippi Election Commission were allowed qualified immunity in a ballot-access dispute.

In this case, the court of appeals ruled that absolute immunity attached because the board members served a judicial function and resolved a dispute. But the courts in the cases mentioned above do not even discuss absolute immunity for election board members. Those cases discuss only whether the elections officials are entitled to qualified immunity. Thus, this case stands alone and is inconsistent with the existing body of law.

All of the other cases analyzed immunity with the principle understanding set out by this court: "For executive officials in general . . . our cases make plain that qualified immunity represents the norm." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). In addition to being inconsistent with all other authority, the opinion in this case also fails to recognize the general rule for immunity analysis for executive officials established by this Court.

Allowing absolute immunity is especially harmful to plaintiffs who were not before the board. The Petitioners here

were damaged, but never have had a chance for compensation for the Members' capricious and politically motivated actions in throwing off the election ballot an entire slate of candidates. Tobin for Governor made significant expenditures, but because of the political decision made by political appointees, the campaign committee has no avenue for compensation other than to pursue the Members, the people who caused the damage. Nor do the individual nomination-petition signers.

The Ninth Circuit would not prevent Charfauros from seeking compensation from election board members whose decision was inconsistent with First Amendment principles. The Seventh Circuit should not be permitted to establish a contrary rule of law that deprives all citizens in all circumstances from obtaining compensation for the same kind of injuries. This Court should grant this petition to review the inconsistency that now exists throughout the federal courts.

II. Illinois State Election Board Members have enormous power to influence candidate-ballot access, a First Amendment right at its zenith. Ballot access affects political speech, the course of the political debate, the right to associate for political purposes, and political power. These plaintiffs have no remedy through the state court system. They should not be precluded from pursuing their only course for a fair remedy by virtue of absolute immunity, a doctrine that other courts do not apply to election board members.

In Illinois, the members of the State Board of Elections are appointed by the governor. By statutory mandate, board membership is based upon political party affiliation. Section 1A-3 of the Illinois Election Code, 10 ILCS 5/1A-3, details how board members are appointed. There are eight members in all, four appointed in each odd-numbered year. Paragraph (1) states that the "Governor shall appoint 2 members of the same political party with which he is affiliated. . . ." Paragraph (2) requires the Governor to "appoint 2 members of the political party whose candidate for Governor in the most recent general election received the second highest number of votes . . . from a list of nominees submitted by the first state executive officer . . . with such political party." The governor may reject the nominees submitted by the second-place party, in which case new nominees must be submitted. All appointments are "subject to the advice and consent of the Senate. . . ." 10 ILCS 5/1A-4.

Thus, membership on the Illinois State Board of Elections is legislatively laced with political cronyism. However, "insulation from political influence" is one of the problems against which both *Cleavinger v. Saxner*, 474 U.S.

193, 202 (1985), and *Butz v. Economou*, 438 U.S. 478 (1978), warn courts to guard when considering whether absolute immunity attaches to certain officials.

The problem is heightened in the elections and ballot-access arena. The Members are in a position in which: (1) they are appointed based on their party affiliation; (2) they sit in judgment over objections brought by their parties to petitions that are filed by the candidates of competing minor parties or of independent candidates; (3) the rulings they make stand to benefit themselves, their parties, and their political cronies. It's equivalent to making members of the teams the referees of the game.

Moreover, the safeguard of the appellate process through the state courts does these plaintiffs no good. They were not parties to the original petition that the Members decided, so they had no avenue to appeal the Members' Decision. Whether the candidates appeared on the ballot was not within their control. But now, by virtue of the absolute immunity granted to the Members, Petitioners are absolutely precluded from seeking compensation for the injuries the Members caused.

Very often, the state appellate process does not provide a meaningful safeguard even to the candidates. This case is an exemplar for how the system can be manipulated to work in favor of the established political parties and against minor-party candidates. The candidates filed their petitions in July 1998. An omnibus objection was filed in August 1998. The candidates had limited resources to contest the vigorous prosecution. The Board called for a hearing and appointed a hearing officer, who held hearings occasionally during the entire summer and into the Fall of 1998. The hearing officer

finally ruled, and concluded that the petition contained enough valid signatures to place the slate of candidates on the election ballot. The next day, October 13, 1998, just two and one-half weeks before the election, the Members made their decision to throw the entire slate of Libertarian Party candidates off the ballot. They did not make written findings, nor state which objections they sustained, as the Illinois Election Code requires. 10 ILCS 5/10-10.

Within the statutory 10 days, the candidates moved for a preliminary injunction to halt the election (motion denied) and then attempted to expedite proceedings on a petition for judicial review of the Members' decision. The state trial court did not rule until the Friday before election day. The relief the candidates sought was to be reinstated to the election ballot, and a declaration that the Board's decision was inconsistent with Illinois law. Instead, the court dismissed the petition on jurisdictional grounds.

The First Amendment protects the right of citizens to associate for political purposes and to form political parties for the advancement of common political goals and ideas. An election campaign is a means of disseminating ideas as well as attaining political office. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). But election boards can and do delay decisions on petition objections to make it difficult for minor-party and independent candidates to engage in the political debate.

The longer the Members wait to rule, the closer the ruling comes to election day, the more difficult it is for minor-party candidates to redress the Members' constitutional violations. When the decision to preclude the minor-party slate from the ballot comes on the eve of the election, the candidates

are left to seek a state court judge brave enough to halt a state-wide election. The chances of that are slim. The losers, in addition to the candidates, are citizens who are deprived of the right to associate for political purposes and to vote effectively.

The longer the Members wait to rule, the greater the damage to fundamental First Amendment speech rights. Most minor-party and independent candidates have a very difficult time raising campaign funds while a petition challenge hangs over them. And money fuels the ability to engage a campaign, a First Amendment right at its zenith. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

> The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas . . . "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." . . . ["The c]onstitutional right of citizens to create and develop new political parties . . . advances the constitutional interest of like-minded voters to gather in pursuit of common political ends."

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

Of course, the ultimate injury under the First Amendment comes when, as here, an election board, for political purposes, denies qualified candidates their pla[illegible]on the election ballot. The candidates and the third-party a[illegible] denied an important

opportunity to disseminate their political message. And citizens are denied an important opportunity to associate for political purposes.

Judicial immunity is for the protection of the public as much as it is for the individual decision-makers. "When we evaluate the claim of immunity for the committee members, we bear in mind that immunity status is for the benefit of the public as well as for the individual concerned." *Cleavinger v. Saxner*, 474 U.S. 193, 203 (1985), citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967). This is precisely what the Seventh Circuit Court of Appeals failed to do in this case. It is precisely the reason that every other case that deals with election officials focuses on whether they have qualified, not absolute, immunity. And it is precisely the reason this Court should grant this petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN R. MERICAN
Counsel of Record
STEVEN R. MERICAN, P.C.
1315 W. 22nd Street – Suite 225
Oak Brook, IL 60523
(630) 579-6460

Attorney for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED OCTOBER 5, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-3097

TOBIN FOR GOVERNOR, JEAN L. BAKER, RAYMOND A. DUBIEL, et al.,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, and its members, individually and in their official capacities, HANNELORE HUISMAN, KENNETH R. BOYLE, et al.,

Defendants-Appellees.

ARGUED MAY 7, 2001 — DECIDED OCTOBER 5, 2001

Before FLAUM, *Chief Judge*, and RIPPLE and DIANE P. WOOD, *Circuit Judges*.

RIPPLE, *Circuit Judge*. The plaintiffs in this case are several Illinois residents who signed a petition to place a slate of candidates from the Libertarian Party of Illinois ("LPI") on Illinois' general election ballot in November 1998, and Tobin for Governor, a political committee formed for the purpose of electing Libertarian candidate James L. Tobin

to the governorship of Illinois (collectively "Tobin for Governor"). Tobin for Governor brought this action under 42 U.S.C. § 1983, and it alleged that the Illinois State Board of Elections ("ISBE" or "the Board") and its individual members (collectively "the defendants") violated the First and Fourteenth Amendments by refusing to certify and to place on the ballot the LPI's slate of candidates. It sought compensatory damages and a declaration that the ISBE's decision was null and void.[1] The defendants moved to dismiss the complaint. The district court dismissed the ISBE and the individual members in their official capacities on the ground of Eleventh Amendment immunity. It also dismissed the claims for damages against the board members in their individual capacities on the ground that they were entitled to quasi-judicial absolute immunity. Lastly, the district court dismissed the claim for declaratory relief as moot. Tobin for Governor now appeals. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

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1. Tobin for Governor also sought a declaration that 10 ILCS 5/10-4 was unconstitutional insofar as it required petition circulators to be registered voters. The district court held that the challenged portion of Illinois' election code was unconstitutional, and the defendants initially cross-appealed that judgment. However, we held a similar provision of Illinois' election code unconstitutional in *Krislov v. Rednour*, 226 F.3d 851, 858-66 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001) (holding 10 ILCS 5/7-10 unconstitutional). Following the Supreme Court's denial of certiorari in *Krislov*, the defendants voluntarily dismissed their cross-appeal. Therefore, we need not discuss this issue further.

Appendix A

I

BACKGROUND

A. Facts

Prior to the November 3, 1998, general election, the LPI submitted a nomination petition to the ISBE in an attempt to establish itself as a new, statewide political party. The nomination petition sought to certify the LPI's slate of candidates for statewide offices and to have those candidates' names listed on Illinois' general-election ballot. Over 60,600 signatures appeared on the nomination petition. On or about August 10, 1998, objections to the LPI's petition were filed. Hearings on the objections began on August 24, 1998, before a duly appointed hearing officer and continued intermittently throughout the summer and fall of 1998. On October 6, 1998, the hearing officer issued an opinion that sustained the objections in part but also determined that the petition had 26,610 valid signatures. Because a new political party only was required to submit 25,000 valid signatures in order to appear on the ballot, *see* 10 ILCS 5/10-2, the hearing officer concluded that the LPI's slate of candidates ought to be certified.

On October 12, 1998, the general counsel to the ISBE wrote an opinion letter to the board members in which he stated that he had "no reason to oppose any recommendation" in the hearing officer's decision and that the hearing officer had "correctly applied the applicable law." R.7 at A35. Nevertheless, on October 13, 1998, the Board struck an additional 4,285 signatures, which left only 22,325 valid

signatures on the petition. Although the Board issued a written opinion, it did not explain the basis for its decision to strike these additional signatures. Once the Board struck the additional signatures, the number of valid signatures remaining on the petition did not meet the statutory requirement of 25,000 signatures. Therefore, the Board refused to certify the LPI's slate of candidates, and those candidates were unable to appear on the general election ballot in November 1998.

B. Earlier Proceedings

1. Related State Court Proceedings

On October 23, 1998, the Libertarian candidates whose names did not appear on the ballot as a result of the Board's decision filed a petition for judicial review in the Circuit Court of Cook County. The court determined that it lacked jurisdiction for two reasons: (1) the LPI was a necessary party that had not been named and (2) the candidates did not serve the objectors or the LPI with a copy of the petition for judicial review within ten days of the Board's decision, as required by 10 ILCS 5/10-10.1. The circuit court therefore dismissed the candidates' petition. The Appellate Court of Illinois affirmed the circuit court's judgment, and the Supreme Court of Illinois denied the candidates' petition for leave to appeal.

2. Proceedings in the District Court

On April 26, 1999, Tobin for Governor filed this action in federal district court against the ISBE and its members in their individual and official capacities. The complaint alleged

that the ISBE's refusal to certify the LPI's slate of candidates violated Tobin for Governor's First Amendment rights to associate and to vote effectively and also violated the Equal Protection Clause of the Fourteenth Amendment. Tobin for Governor asked for money damages as well as for a declaratory judgment that the ISBE's decision was unconstitutional and void.

The defendants moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court dismissed the ISBE and its members in their official capacities on the ground of Eleventh Amendment immunity.[2] The court then dismissed Tobin for Governor's claims for monetary relief against the board members in their individual capacities because it determined that the board members were entitled to quasi-judicial absolute immunity. The court found that the board members were acting in an adjudicative capacity when they evaluated the nomination petition and that the necessary safeguard of judicial review was available, thus making absolute immunity appropriate.

Lastly, the court held that Tobin for Governor's request for a declaration that the Board's decision was unconstitutional and void was moot because the election already had taken place by the time Tobin for Governor had filed suit. Following the district court's judgment, Tobin for Governor filed this appeal.

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2. Tobin for Governor does not appeal this aspect of the district court's judgment.

Appendix A

II

DISCUSSION

We review the district court's grant of a motion to dismiss de novo. *See Crenshaw v. Baynerd*, 180 F.3d 866, 868 (7th Cir.), *cert. denied*, 528 U.S. 952 (1999). We accept all of the well-pleaded factual allegations in the plaintiff's complaint as true and draw all reasonable inferences in favor of the plaintiff. *See id.* We shall affirm the district court's dismissal of the complaint only if it appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle it to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Crenshaw*, 180 F.3d at 868.

Tobin for Governor argues that the district court erred in granting the board members absolute immunity. It also contends that its request for a declaratory judgment was not moot and that the district court erred in dismissing it on those grounds. We examine each of these arguments in turn.

A. Absolute Immunity

1.

We must take a functional approach to determining whether absolute immunity is appropriate. *See Forrester v. White*, 484 U.S. 219, 224 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985). Title or rank alone is an insufficient basis on which to confer absolute immunity; instead, whether absolute immunity ought to be afforded must be determined by the nature of the responsibilities of the official in question.

See Forrester, 484 U.S. at 224 ("[W]e examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."); *Cleavinger*, 474 U.S. at 201. Absolute immunity is available to members of quasi-judicial adjudicatory bodies when they perform duties that are functionally comparable to those of a judicial officer. *See Butz v. Economou*, 438 U.S. 478, 512-13 (1978); *Crenshaw*, 180 F.3d at 868. "[T]he nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have." *Forrester*, 484 U.S. at 226. Thus, the cloak of immunity is designed to prevent a situation in which decision-makers "act with an excess of caution or otherwise . . . skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct," *id.* at 223 out of a fear of litigation or personal monetary liability, *see Crenshaw*, 180 F.3d at 868.

"[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Toward that end, the board members argue that they are entitled to absolute immunity because they were acting in an adjudicative capacity when they considered and ruled on the objections to the nomination petition. We agree.

Although the ISBE is charged with many diverse responsibilities with respect to the administration of elections, the Election Code of Illinois specifically gives it the statutory duty to "hear and pass upon objections to the

nominations of candidates for State offices." 10 ILCS 5/10-9(1).[3] The statutory provision that governs the means by which the ISBE may evaluate petitions gives the ISBE many of the same powers as a court:

> The electoral board shall have the power to administer oaths and to subpoena and examine witnesses and at the request of either party the chairman may issue subpoenas requiring the attendance of witnesses and subpoenas duces tecum requiring the production of such books, papers, records and documents as may be evidence of any matter under inquiry before the electoral board, in the same manner as witnesses are subpoenaed in the Circuit Court.

10 ILCS 5/10-10. In this case, the method by which the petition and the objections to it were evaluated was remarkably like a trial. First, written objections to the petition were filed. A hearing on the objections was scheduled, and the parties were given notice of the hearing date. Both the objectors and the candidates were represented by attorneys at the hearing and were given the opportunity to present evidence in support of their cases. The hearing officer, who functioned much like a magistrate judge, evaluated the evidence and the arguments, considered their merits in light

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3. The election code requires the ISBE to "take up the question[s] as to whether or not" the nomination petitions "are in proper form, and whether or not they were filed within the time and under the conditions required by law." 10 ILCS 5/10-10. The ISBE also must decide whether the objections to the nomination petitions ought to be sustained. *See id.*

of the relevant law, and issued a recommendation. The Board then considered the hearing officer's recommendation and decided whether to accept it, just as a district court would do. In light of the nature of these proceedings, we believe it is an inescapable conclusion that the board members were acting in the functional capacity of judges when they ruled on the objections to the nomination petition.

Moreover, the conditions under which the board members must operate also support an award of absolute immunity. The Board's task of determining the validity of nomination petitions is likely to be controversial and to come under intense political scrutiny. To protect the integrity of the electoral process, it is necessary to protect the board members from harassment and intimidation so that they can exercise their independent judgment. *See Cleavinger*, 474 U.S. at 202 (listing "the need to assure that the individual can perform his functions without harassment or intimidation" as a factor to be considered in the absolute immunity analysis); *see also Burns*, 500 U.S. at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." (emphasis in original)).

2.

Our conclusion that the board members are entitled to absolute immunity is supported by a line of cases in which we have awarded absolute immunity to members of state agencies operating in other contexts. For instance, we have granted the members of the Indiana Civil Rights Commission absolute immunity for their decision not to investigate a

charge of discrimination; we determined that they were acting in an adjudicatory capacity when they concluded that they lacked jurisdiction to review and to consider the charge. *See Crenshaw*, 180 F.3d at 868. We have held that a local liquor control commissioner acted in a judicial capacity when he revoked a liquor license, which entitled him to absolute immunity. *See Reed v. Village of Shorewood*, 704 F.2d 943, 951-52 (7th Cir. 1983).[4] We also have granted absolute immunity to members of a prison review board who revoked a plaintiff's supervised release after they held a hearing to evaluate whether revocation was proper. *See Wilson v. Kelkhoff*, 86 F.3d 1438, 1443-45 (7th Cir. 1996). We held that the review board members were absolutely protected from suit for their failure (1) to provide the plaintiff sufficient

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4. Other circuits, as well, have granted members of professional licensing boards absolute immunity for their actions during disciplinary proceedings. *See, e.g., Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 633-36 (5th Cir. 2000) (granting absolute immunity to members of the Texas State Board of Dental Examiners for their decision to revoke the plaintiff's license to practice dentistry), *cert. denied*, 531 U.S. 871 (2000); *Mishler v. Clift*, 191 F.3d 998, 1004-08 (9th Cir. 1999) (collecting cases) (holding that the Nevada Board of Medical Examiners was entitled to absolute immunity for acts occurring during the disciplinary hearing process, including holding hearings, taking evidence, and adjudicating the dispute); *Romano v. Bible*, 169 F.3d 1182, 1187 (9th Cir.) (granting absolute immunity to members of the Nevada Gaming Commission for their actions in approving a stipulation that the plaintiff entered into with a gaming board to resolve a disciplinary proceeding), *cert. denied*, 528 U.S. 816 (1999); *Watts v. Burkhart*, 978 F.2d 269, 272-78 (6th Cir. 1992) (granting members of the Tennessee Board of Medical Examiners absolute immunity for the decision they reached during a summary suspension hearing).

notice of the hearing and (2) to allow the plaintiff to present evidence and witnesses. *See id.* at 1445.

Similarly, we have granted absolute immunity to state parole officials with respect to their decisions to grant, deny, or revoke parole, *see, e.g.*, *Trotter v. Klincar*, 748 F.2d 1177, 1181-83 (7th Cir. 1984), and for their decision as to when to schedule a parole-revocation hearing, *see Thompson v. Duke*, 882 F.2d 1180, 1184 (7th Cir. 1989).[5] Our decision in *Trotter* was based in part on the fact that the parole officials' functions were "analogous to judicial action relating to the conduct of trial proceedings and to rulings on motions of counsel." *Trotter*, 748 F.2d at 1182. In addition, we have granted the Indiana attorney general absolute immunity when he acted in an adjudicatory function by determining whether to approve a contract under a statutory provision that required him to ensure the contract's legality. *See Mother Goose Nursery Schs., Inc. v. Sendak*, 770 F.2d 668, 670-75 (7th Cir. 1985).[6]

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5. *See also Walrath v. United States*, 35 F.3d 277, 280-84 (7th Cir. 1994) (granting absolute immunity to members of a federal parole board for their decision to revoke parole).

6. Similarly, the Eighth Circuit has granted absolute immunity to a board of aldermen who conducted impeachment proceedings against the mayor because those proceedings required the aldermen to function "like judges in that they were required to determine whether bias existed, to hear testimony and receive evidence, to evaluate the credibility of witnesses and weigh the evidence, and to make findings of fact and conclusions of law." *Brown v. Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992). The court also explained that a " 'judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.' " *Id.* (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)).

With respect to the case before us, we believe that the ISBE's conduct in evaluating the LPI's nomination petition falls within the heartland of what these cases have established as quasi-judicial adjudicatory functions.

3.

Nevertheless, Tobin for Governor maintains that an award of absolute immunity would not be appropriate in this case because (1) there is no common-law or historical basis for it; (2) this case is not an instance of vexatious litigation; (3) there is no effective check on the board members' potential abuse of authority; and (4) as political appointees of the major political parties, the board members are not sufficiently insulated from political pressures. We are unpersuaded by these arguments. We can dispose easily of the first two because they misapprehend the fundamental nature of quasi-judicial absolute immunity. Although Tobin for Governor correctly asserts that the ISBE is a statutory creation with no common-law history of immunity for its members, this assertion overlooks the fact that the board members function in a capacity equivalent to that of judges, and judges have an extensive common-law history of enjoying absolute immunity for their judicial acts. *See, e.g.*, *Cleavinger*, 474 U.S. at 199-200 (discussing the common-law history of judicial immunity and stating that " '[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction' " (quoting *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967))). Indeed, the Supreme Court itself has granted absolute immunity to administrative law judges, whose positions also are statutory creations. *See Butz*, 438 U.S. at 514.

Tobin for Governor's second contention — that its case is not an instance of vexatious litigation — does not properly take account of the scope of an award of absolute immunity. As we already have indicated, absolute immunity is available to quasi-judicial officers because the threat of being subjected to *any* litigation impedes the officers' ability to engage in independent and fearless decision-making. The possibility of a case-by-case exception that would permit non-vexatious suits to proceed would destroy the protection that absolute immunity provides to the judicial process. Even if Tobin for Governor's suit is meritorious — and therefore not vexatious — it cannot pierce the shield of absolute immunity because judicial officers are entitled to that immunity even when they act in error, maliciously, or in excess of their authority. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 356 & 359 (1978) ("A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors.").

In light of the structure of the Illinois election code, we also are unable to accept Tobin for Governor's assertion that there are no effective checks on the board members' potential abuse of authority. Quite to the contrary, Illinois' election code specifically provides for judicial review of the Board's decision in the state circuit courts. *See* 10 ILCS 5/10-10.1;[7]

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7. 10 ILCS 5/10-10.1 reads in relevant part:

> [A] candidate or objector aggrieved by the decision of an electoral board may secure judicial review of such decision in the circuit court of the county in which the hearing of the electoral board was held. The party seeking

(Cont'd)

see also Cleavinger, 474 U.S. at 202 (listing "the correctability of error on appeal" as one factor that favors a grant of absolute immunity). Tobin for Governor suggests that the board members have an incentive to delay their decision until it will be virtually impossible to obtain review before the election, and it points to the Libertarian candidates' attempt to obtain judicial review following the Board's decision in this case as support for its contention. However, the LPI candidates were unsuccessful in obtaining review because they did not follow the procedural requirements of the election code, not because the Board unduly and purposefully delayed its decision. Not only did the Libertarian candidates fail to comply with the time requirements of the election code, but they failed to name the LPI as a necessary party and thereby deprived the circuit court of jurisdiction. Had the candidates complied with the statute's terms, they would have obtained review.

Moreover, the election code contains provisions that help guard against the kind of stonewalling that Tobin for Governor anticipates. Nomination petitions must be filed

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> review must file a petition with the clerk of the court within 10 days after the decision of the electoral board. The petition shall contain a brief statement of the reasons why the decision of the board should be reversed. The petitioner shall serve a copy of the petition upon the electoral board and other parties to the proceeding . . . .
>
> The court shall set the matter for hearing to be held within 30 days after the filing of the petition and shall make its decision promptly after such hearing.

approximately three months prior to the election. *See* 10 ILCS 5/10-6. Any objections to the nomination petitions must be made in writing within five business days after the last day for filing the nomination petition. *See* 10 ILCS 5/10-8. Within twenty-four hours of receiving the objections, the chairman of ISBE must notify the candidates whose petitions were objected to that the ISBE is required to meet and pass upon the validity of the petitions, and he must give them notice of the date and time of the hearing. *See* 10 ILCS 5/10-10. The ISBE must hold its hearing not less than three nor more than five days from the time it received the objections. *See id.* Within ten days of the Board's certification decision, the candidate must file a petition for judicial review in the circuit court. *See* 10 ILCS 5/10-10.1. Once a candidate has filed a petition for judicial review, the court must hold a hearing on the petition within thirty days of the filing, and the court is directed by statute to reach a decision "promptly after such hearing." *Id.* These statutory provisions should allow candidates to obtain judicial review prior to the election. If, however, the Board does not issue its decision in sufficient time for the candidate to pursue the normal avenues of judicial review prior to the election, the candidate may seek a writ of mandamus in the Supreme Court of Illinois. *See Dooley v. McGillicudy*, 345 N.E.2d 102, 104 (Ill. 1976) (" 'In cases involving the election process, where the time factor alone would usually render an appeal futile, this court has seen fit to grant original writs of mandamus.' " (emphasis in original) (quoting *People ex rel. Meyer v. Kerner*, 219 N.E.2d 617, 619 (1966))). In light of these various methods of ensuring judicial review prior to the election, we do not believe that the candidates' inability to obtain review of the Board's decision here — an inability that resulted from their

own procedural mistakes — is a proper basis on which to deny the board members absolute immunity.

Lastly, we are unwilling to accept Tobin for Governor's unsupported allegation that the board members will not treat minority-party and independent candidates fairly because the members have too great a stake in advancing the interests of the major political parties to which they belong.[8] Although the board members are appointed to the ISBE by the governor, whose decision may include political considerations, "political or electoral pressure alone cannot deprive government officials of absolute immunity." *Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. 1992). As the Eighth Circuit has pointed out, if the rule were otherwise, state judges who are elected would not be entitled to absolute immunity. *See id.* Instead, "for purposes of immunity analysis, the insulation-from-political-influence factor does

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8. We believe it is important to note that Tobin for Governor's argument is premised on the faulty assumption that the board members always will belong to either the Republican or Democratic parties. The appointment provisions of the election code in no way compel that result. Of the eight board members, four will be affiliated with the same political party as the governor, and four will be affiliated with the political party whose nominee for governor in the most recent election received the second highest number of votes. *See* 10 ILCS 5/1A-2. Although as a practical matter the composition of the Board is likely to consist primarily of Republicans and Democrats, it is at least possible that other parties will obtain representation on the Board. Therefore, we cannot base our analysis on the assumption that only Republicans and Democrats will serve on the Board. Tobin for Governor's argument further assumes that the political "outs" will never find friends among the political "ins," which is an assumption that may not be realistic.

not refer to the independence of the government official from the political or electoral process, but . . . to the independence of the government official as a decision-maker." *Id.*

There are several provisions in the Illinois election code that insulate the board members from political influences and that protect their independence as decision-makers. Although the board members are appointed by the governor, they serve for a term of years, not at the pleasure of the governor. *See* 10 ILCS 5/1A-3.1. Perhaps more importantly, the board members may not "engage in any partisan political activity whatsoever;" may not contribute to political parties, candidates, or organizations financially or through services; and may not "become a candidate for nomination for, or election to, or accept appointment to any public office" so long as they hold their position on the ISBE. 10 ILCS 5/1A-13. These provisions help insulate the board members' decision-making process from political influences, which weighs in favor of granting absolute immunity. *See Cleavinger*, 474 U.S. at 202 (listing "insulation from political influence" as a factor that can support an award of absolute immunity). We simply are unwilling to assume that the board members cannot be impartial because they retain their own party affiliation.

In conclusion, the board members act in the functional capacity of judges when they rule on the validity of nomination petitions, which entitles them to quasi-judicial absolute immunity. Tobin for Governor's arguments do not persuade us that the result should be otherwise.[9] Consequently,

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9. In two cases, the Ninth Circuit has been asked to determine whether the members of an election board enjoyed qualified (Cont'd)

the district court correctly dismissed the claims for monetary relief against the board members in their individual capacities.

B. Justiciability

Tobin for Governor maintains that the district court erred in dismissing as moot its request for a declaratory judgment

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immunity. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 951-56 (9th Cir. 2001) (holding that a territorial board of elections could not claim qualified immunity when the board had implemented and applied new and discriminatory procedures to determine whether certain individuals, whose eligibility had been challenged, were entitled to vote); *Oakley v. Pasadena*, 535 F.2d 503, 504-05 (9th Cir. 1976) (holding in a pre-Butz case that the city board members had qualified immunity for denying a candidate a place on the ballot after a police report indicated that the candidate was not a resident of the city). In these cases it does not appear that the court was asked to determine whether the board members were entitled to absolute immunity. Nor can we be certain that the procedural contexts in those cases placed the board in an analogous decision-making context to the one of the ISBE in this case. Several district court cases also deal with whether members of an election board are eligible for qualified immunity. *See McLaughlin v. City of Canton*, 947 F. Supp. 954, 966-68 (S.D. Miss. 1995); *Hirschfeld v. Spanakos*, 909 F. Supp. 174, 177-80 (S.D.N.Y. 1995), *rev'd on other grounds*, 104 F.3d 16 (2d Cir. 1997); *Pestrak v. Ohio Elections Comm'n*, 670 F. Supp. 1368, 1372 (S.D. Ohio 1987), *rev'd in part on other grounds*, 926 F.2d 523 (6th Cir. 1991); *Kilgore v. McClelland*, 637 F. Supp. 1241, 1246-47 (W.D. Va. 1986); *De La Cruz v. Dufresne*, 533 F. Supp. 145, 149-50 (D. Nev. 1982). However, these cases do not indicate that the issue of absolute immunity ever was submitted to the court. Nor do these cases arise in procedural contexts sufficiently close to the case before us to offer any persuasive guidance.

that the Board's decision to deny the LPI access to the ballot was unconstitutional and void. In Tobin for Governor's view, the Board's written decision did not comply with the election code because it did not state which objections to the nomination petition it sustained, and this problem is capable of repetition and yet will evade review. The defendants respond that Tobin for Governor does not have standing to bring this claim because (1) its injury is derivative of the LPI's and the candidates' inability to obtain ballot access and (2) it is speculative to assume that Tobin for Governor will be injured the same way in the future.

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary*, 501 U.S. 312, 320 (1991). Tobin for Governor's claim for declaratory relief is nonjusticiable on two grounds: Tobin for Governor lacks standing to bring this claim, and the claim is now moot.

1. Standing

To establish standing, a plaintiff must show (1) injury in fact, meaning an invasion of a legally protected interest that is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the defendant's actions; and (3) that a

favorable decision is likely to redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Sierakowski v. Ryan*, 223 F.3d 440, 442-43 (7th Cir. 2000). With respect to the injury in fact requirement, the plaintiff must establish that he has sustained or is immediately in danger of sustaining some direct injury. *See Lyons*, 461 U.S. at 101-02; *Sierakowski*, 223 F.3d at 443. "Abstract injury is not enough." *Lyons*, 461 U.S. at 101. Moreover, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy" regarding prospective equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). A plaintiff's speculation that he may suffer the same injury at some time in the future is insufficient to establish standing. *See Lyons*, 461 U.S. at 105; *Sierakowski*, 223 F.3d at 444.

Tobin for Governor's assertion that it is likely to be injured in the future in the same way it was injured in this case is purely speculative. The gravamen of Tobin for Governor's complaint is that the Board committed serious procedural errors in refusing to certify the LPI's slate of candidates, that those errors infringed on Tobin for Governor's constitutional rights, and that the Board is likely to make the same procedural errors in the future. However, Tobin for Governor cannot demonstrate a "realistic threat" that it will be subject to the same procedural errors in the future. *Perry v. Sheahan*, 222 F.3d 309, 313 (7th Cir. 2000). In order for Tobin for Governor to be subject to the same injuries it claims to have suffered in the last election, several contingencies would have to occur during the next election. Jim Tobin and the other Libertarian candidates would have to decide to run for state office, they would have to collect over 25,000 signatures, they would need to submit those

signatures to the Board, a hearing officer would need to determine that those signatures were sufficient, the Board then would have to override the hearing officer's determination, and the Board would have to issue a written opinion that did not describe precisely the objections that it sustained. We have no basis on which to conclude that each of these contingencies will recur during the next election. Although past wrongs "may be evidence that future violations are likely to occur[,] . . . in this case the allegations regarding past conduct still leave us with bare speculation" about what will occur during the next election. *Sierakowski*, 223 F.3d at 445 (internal citations omitted). Consequently, Tobin for Governor has failed to establish that it has "the requisite personal stake in the outcome of this litigation to establish standing" to seek declaratory relief. *Id.* at 444.

2. Mootness

Tobin for Governor's claim for declaratory relief also is nonjusticiable because it is moot. A case is moot when it no longer presents a live case or controversy. *See Bd. of Ed. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464, 467 (7th Cir. 1996). The November 1998 election had come and gone by the time Tobin for Governor filed its action in the district court. Thus, the relief that Tobin for Governor requested — a declaration that the Board's decision was unconstitutional and void — would have no impact on the parties to this suit or on the results of the November 1998 election. We are well aware that the passage of an election does not necessarily render an election-related challenge moot and that such challenges may fall within the "capable of repetition yet evading review" exception to the mootness

doctrine. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997). This, however, is not such a case. The cases that traditionally have fallen within the "capable of repetition" exception have involved challenges to the validity of statutory provisions that will continue to operate past the election in question and that will burden future candidates in future elections.[10] In those circumstances, the challenge reflects a "continuing controversy," *see Moore*, 394 U.S. at 816, and "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held," *Storer v. Brown*, 415 U.S. 724,

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10. *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992) (holding that candidates' constitutional challenge to two provisions of Illinois' election code was not moot once the election was over because there was every reason to suspect that the parties would bring the same challenge to the same provisions in the future); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (holding that constitutional challenges to the provisions of California's election code that required candidates to be politically disaffiliated for at least one year and to file nomination petitions that satisfied stringent signature requirements were not moot once the election was "long over" because the effects of the statutes would "persist as [they were] applied in future elections"); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (holding that candidates' challenge to a statutory signature requirement was not moot once the election had been held because the burden "placed on the nomination of candidates for statewide offices remain[ed] and control[led] future elections"); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir. 1997) (holding that candidate's constitutional challenge to Indiana's anti-fusion law was not moot once the election had passed because the same challenge could be raised to the same statute during the next election).

737 n.8 (1974). Tobin for Governor's challenge, however, is not to any statutory provision that will continue to operate past the November 1998 election. Instead, Tobin for Governor challenges the particular procedures by which the Board issued its decision in the past election. Because the Board's ruling on the LPI's 1998 nomination petition — and hence its alleged procedural oversights — was a one-time decision, we are unable to conclude that the issues Tobin for Governor has raised with respect to that decision are of a continuing nature.

Moreover, the "capable of repetition" exception applies only when (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *See Il. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Neither of these conditions is satisfied in this case. First, a controversy of this sort does not necessarily evade review. As we already have discussed, judicial review of the Board's decision is available by statute if the proper procedural steps are followed, and the state courts to which that review is directed can order a new election if the case is not fully litigated prior to election day. It was only the Libertarian candidates' procedural missteps that prevented judicial review of the Board's decision here, which we believe is insufficient to bring this case within the "evading review" requirement of the exception.

Further, we do not believe that there is a reasonable expectation that Tobin for Governor will find itself in this

same situation in the future. As we discussed with respect to the standing inquiry, numerous contingencies would need to occur before Tobin for Governor would find itself subjected to these same injuries again. Because we believe it is pure speculation that these contingencies all will reoccur, the "capable of repetition" exception to the mootness doctrine does not apply.

Tobin for Governor does not have standing to pursue its claim for declaratory relief nor does it present the court with a live case or controversy. Therefore, the district court did not err in dismissing Tobin for Governor's claim for declaratory relief.

Conclusion

Tobin for Governor may not sue the members of the ISBE in their individual capacities because they are entitled to quasi-judicial absolute immunity. Tobin for Governor's claim for declaratory relief is nonjusticiable because Tobin for Governor lacks standing and because the claim is moot. We therefore affirm the judgment of the district court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED DECEMBER 7, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 C 2713

Judge Robert W. Gettleman

TOBIN FOR GOVERNOR, JEAN L. BAKER, RAYMOND A. DUBIEL, JAMES J. MORRIS, and ROBERT S. REDFERN,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS, and its members, individually and in their official capacities, HANNELORE HUISMAN, KENNETH CHARLES J. DURHAM, WILLIAM MCGUFFAGE, DAVID E. MURRAY, PHILIP O'CONNOR, WANDA REDNOUR, and ELAINE ROUPAS,

Defendants

MEMORANDUM OPINION AND ORDER

Plaintiffs Tobin for Governor, Jean L. Baker, Raymond A. Dubiel, James J. Morris and Robert S. Redfern have

brought a six count complaint against the Illinois State Board of Elections ("the Board") and its members, Hannelore Huisman, Kenneth R. Boyle, Charles J. Durham, William McGuffage, David E. Murray, Philip O'Connor, Wanda Rednour, and Elaine Roupas, individually and in their official capacities (jointly, "the individual defendants"), alleging that defendants violated plaintiffs' constitutional right to vote and associate when they refused to certify a slate of candidates for all state-wide offices offered by the Libertarian Party on the General Election Ballot in November 1998. Plaintiffs ask the court to: 1) declare the decision by the Board to be unconstitutional and void on its face as applied; 2) declare § 5/10-4 of the Illinois Election Code, 10 ILCS 5/10-4, unconstitutional insofar as it requires petition circulators to be registered voters; 3) "require the Board to give public notice and individual notice where possible to signers of petitions which are attacked pursuant to the Illinois Election Code"; and 4) $5,000,000 in actual and punitive damages. The Board has moved to dismiss for lack of subject matter jurisdiction based on the Eleventh Amendment. The individual defendants have filed a separate motion to dismiss asserting: lack of jurisdiction based on the *Rooker-Feldman* doctrine; absolute immunity from claims for money damages; lack of standing; and abstention. For the reasons set forth below, the Board's motion is granted, and the individual defendants' motion is granted in part and denied in part.

Facts

Plaintiff Tobin for Governor is a political committee created on or about April 21, 1998, for the purpose of electing Libertarian candidate Jim Tobin governor of the State of

Illinois. Plaintiffs Baker, Dubiel, Morris and Redfern are all citizens and residents of Illinois, who signed a nomination petition that was filed by the Libertarian Party and is the subject of the instant lawsuit. At the time they signed the petition, Baker, Dubiel, Morris and Redfern all intended to vote in the general election held on November 3, 1998.

The Libertarian Party of Illinois sought valid access to form a new state-wide political party pursuant to the Illinois Election Code, 10 ILCS 5/10-1 *et seq*. To that end, the party filed nomination papers with a slate of candidates. Objections to the nomination petitions were filed with the defendant Board on or about August 10, 1998. *In re Libri v. Libertarian Party*, 98 SEBNP 18. Hearings on the objections began on August 24, 1998, before an appointed hearing officer. The hearings continued periodically during the summer and fall of 1998, concluding on October 6, 1998, when the hearing officer rendered a decision sustaining the objection in part, concluding that the nomination petition had 26,610 valid signatures, 1,610 more than required by 10 ILCS 5/10-2 to place the slate of candidates on the general election ballot.

On October 12, 1998, A. L. Zimmer, general counsel to the Board, indicated in a memorandum that he found no reason to oppose any recommendation of the hearing officer. Nonetheless, on October 13, 1998, defendants struck an additional 4,285 signatures from the petition, leaving it approximately 3,000 signatures short of the required 25,000. Therefore, the slate of candidates was not certified for the general election ballot held on November 3, 1998.

The Libertarian candidates filed an action for judicial review in the Circuit Court of Cook County, Illinois, *Tobin*

v. Libri, 98 CO152 (the "state court action"). The Libertarian Patty was not joined as a plaintiff. The circuit court dismissed on two separate jurisdictional grounds. First, the court held that under the Election Code the Libertarian Party of Illinois, vas a necessary party to the action. Second, the candidates had failed to place the complaint for judicial review for service within the 10 days mandated by the Election Code, depriving the court of subject matter jurisdiction. The candidates appealed to the Illinois Appellate Court, No. 98-4392. While the instant case was pending, the appellate court affirmed the dismissal for lack of jurisdiction.

Discussion

The Board has moved to dismiss the instant action based on the Eleventh Amendment to the United States Constitution, which "prohibits courts from deciding suits brought by private litigants against states or their agencies, and that prohibition extends to state officials acting in their official capacities." *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994). Plaintiffs have not responded to the Board's motion, apparently conceding that the Board is a state agency for purposes of Eleventh Amendment immunity. Accordingly, the Board's motion to dismiss is granted. Additionally, because the immunity extends to officials acting in their official capacity, *id.*, the claims against the individual defendants in their official capacities are also dismissed.

That leaves only plaintiffs' claims against the individual defendants acting in their individual capacities. The individual defendants first argue that this suit against them is barred by the *Rooker-Feldman* doctrine. The origin of this

doctrine is traced to two United States Supreme Court decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In Rooker an unsuccessful state court plaintiff brought a federal action claiming that the state court decision was based on an unconstitutional state statute. The Supreme Court held that the district court had no jurisdiction because federal district court jurisdiction is strictly original. 263 U.S. at 416. Therefore, once a state court has rendered a decision, even if incorrect, only the United States Supreme Court can reverse or modify that judgment. *Id.* at 415-16.

In *Feldman*, the plaintiffs petitioned the District of Columbia for a waiver of a bar admission rule. After failing to obtain the requested relief, they filed in federal district court, arguing that the admission rule was unconstitutional. The Supreme Court held that the district court lacked subject matter jurisdiction to review the denial of the petition to be admitted to the bar, but the court had jurisdiction over the claim that the admission rule was unconstitutional. The court stated that federal courts lacked jurisdiction to review a state court's judicial decision, but could review whether the District of Columbia's courts acted unconstitutionally in passing the admission rule because that involved a non judicial function. 462 U.S. at 476.

The Seventh Circuit looks to the source of the injury to determine whether *Rooker-Feldman* applies. *See Fayyumi v. Hickory Hills*, 18 F. Supp.2d 909, 916 (N.D. Ill. 1998). If the defendant had the authority to inflict the injury without resort to the state courts, then the injury is complete prior to the state court judgment, and the federal plaintiff is seeking

to reverse an injury inflicted by the defendant rather than the court. In such instances the *Rooker-Feldman* doctrine is inapplicable. *See Centres, Inc. v. Brookfield*, 148 F.3d 699 (7th Cir. 1998). In contrast, if the federal defendant did not have the authority to inflict the injury without a state court ruling, (e.g., a foreclosure sale), then the injury suffered by the federal plaintiff is not complete until the state court judgment, and the plaintiff is actually seeking a reversal of an injury inflicted by the court. This is what *Rooker-Feldman* bars. *See GASH Assoc. v. Village of Rosemont*, 995 F.2d 726 (7th Cir. 1993).

In the instant case, even absent the obvious fact that plaintiffs here were not parties to the state court action, defendants' argument is based on the assumption that *Rooker-Feldman* applies to administrative proceedings. It does not. *Van-Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997). Moreover, the fact that the administrative decision was affirmed on judicial review does not help defendants, because the injuries for which plaintiffs seek redress were not caused by the state court decision. Under the Election Code, the Board has the authority to "[d]etermine the validity and sufficiency of petitions . . . ." 10 ILCS 5/1A-8. The decision of the Board is final, and there is no need for an order from a court to give it effect. Therefore, *Rooker-Feldman* does not bar the instant action.[1]

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1. Although *Rooker-Feldman* does not apply, res judicata might, *Fayyumi*, 18 F. Supp.2d at 914, if any plaintiffs are in privity with any of the parties to the state court action. Res judicata is an affirmative defense, however, and has not been pleaded by defendants.

Appendix B

Next, the individual defendants argue that plaintiffs' claims for money damages are barred by the doctrine of absolute immunity. Judges have absolute immunity from money damages. *Stump v. Sparkman*, 435 U.S. 349 (1978). This immunity covers all judicial acts. *Id.* In *Butz v. Economou* the court extended absolute immunity to federal officials performing functions comparable to those of judges, such as hearing officers and administrative law judges. 438 U.S. 478 (1978). This quasi judicial immunity has been further extended to state agency officials involved in adjudication of state regulatory matters. *See e.g., Wilson v. Kelkhoff*, 86 F.3d 1438, 1443 (7th Cir. 1996). In *Butz*, the Supreme Court stated that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities," 438 U.S. at 511, "and from the characteristics of the judicial process." *Id.* at 512. The Court considered the nature of the hearing examiner and administrative law judges' responsibilities and determined that, like judges, these officials must be free "to perform their respective functions without harassment or intimidation." *Id.*

In the instant case, the Board was acting in an adjudicative capacity when it determined the validity of the petition signatures. It appointed a hearing officer who conducted evidentiary hearings, reviewed the hearing officer's findings, and then rendered its conclusions. The state system provides for judicial review of the Board's decision, thereby creating the necessary safeguards. The entire process was adjudicatory in nature. Accordingly, this court concludes that defendants are entitled to quasi judicial immunity, and plaintiffs' claims for monetary relief are dismissed.

Appendix B

Plaintiffs' remaining claims are for declaratory and injunctive relief Plaintiffs seek a declaration that the Board's decision violated their constitutional rights and is therefore void on its face and as applied; that 10 ILCS 5/10-4 is unconstitutional to the extent that it requires petition circulators to be registered voters; and that the Board be required to give public notices and individual notice where possible to signers of petitions that are challenged pursuant to the Election Code.

Defendants argue that plaintiffs lack standing to raise these claims because there is no live case or controversy. Defendants argue that there is no proof that the unique fact-dependant scenario adjudicated by the Board in the instant case with ever reoccur. With respect to the claim to declare the decision of the Board void, the court agrees. Obviously, the actual decision is now moot because the November 1998 election has come and gone.[2] With respect to plaintiffs' challenge to the statutory scheme, however, the court disagrees. The state court record demonstrates that the Board hears numerous objections to petitions, generally involving claims that signatures were made by the same person or persons. Thus, although there is no evidence that these individual candidates will run again, there will be future objections ruled on by the Board pursuant to the same statutory scheme attacked in the instant case.

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2. It may be (but has not been argued) that Tobin for Governor may no longer have standing because the purpose for which it was apparently formed (to run a candidate in the 1998 election) has disappeared.

Appendix B

Contrary to defendants' argument, plaintiffs are asserting their own constitutional rights, not the rights of the candidates. They claim that the statutory scheme followed by the Board deprived them of their right to associate and vote for the candidate of their choice. That scheme remains in place, and plaintiffs have a right and the standing to challenge it. Similar challenges were raised by citizens and sustained by the Supreme Court in *Buckley v. ACLF, Inc.*, 525 U.S. 182, 119 S.Ct. 636 (1999). Accordingly, the court concludes that plaintiffs' have standings to assert these claims.[3]

Conclusion

For the reasons set forth above, the State Board of Elections' motion to dismiss is granted. The individual defendants' motion to dismiss is granted as to all claims for monetary relief and plaintiffs' request to void the Board's actual decision, and denied as to claims for injunctive and declaratory relief. This matter is set for a report on status on December 29, 1999, at 9:00 a.m., at which time the parties are directed to present a definitive discovery plan.

ENTER: December 7, 1999

s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

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3. Defendants' abstention objections are moot because the Illinois Appellate Court has now ruled on the state court action.